IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH ALLIANCE, FUND TEXAS CHOICE, LILITH FUND, INC., NORTH TEXAS EQUAL ACCESS FUND, THE AFIYA CENTER, WEST FUND, BHAVIK KUMAR, M.D., M.P.H.	) AU:18-CV-00500-LY
Plaintiffs,	)
V.	) AUSTIN, TEXAS
KEN PAXTON, CECILE YOUNG, JOHN W. HELLERSTEDT, M.D., DAVID ESCAMILLA, STEPHEN BRINT CARLTON, JAMES B. MILLIKEN,	)
Defendants.	) JANUARY 7, 2019

****

TRANSCRIPT OF ORAL ARGUMENT ON MOTION TO DISMISS

BEFORE THE HONORABLE LEE YEAKEL

****

APPEARANCES:

FOR THE PLAINTIFFS:
STEPHANIE TOTI
JUANLUIS RODRIGUEZ
LAWYERING PROJECT
25 BROADWAY, 9TH FLOOR
NEW YORK, NEW YORK 10004

RUPALI SHARMA
LAWYERING PROJECT
99 SILVER STREET, APT. 4-10
PORTLAND, MAINE 04101

PATRICK J. O'CONNELL
LAW OFFICES OF PATRICK J. O'CONNELL PLLC
2525 WALLINGWOOD DRIVE, BUILDING 14
AUSTIN, TEXAS 78746

FOR THE DEFENDANTS:
ANDREW BOWMAN STEPHENS
BETH KLUSMANN
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
PO BOX 12548 CAPITAL STATION
AUSTIN, TEXAS 78711

ADAM ARTHUR BIGGS
OFFICE OF THE ATTORNEY GENERAL
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

HEATHER GEBELIN HACKER
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
209 WEST 14TH STREET, 7TH FLOOR
AUSTIN, TEXAS 78701

LESLIE W. DIPPEL
PATRICK POPE
TRAVIS COUNTY ATTORNEY'S OFFICE
P.O. BOX 1748
314 WEST 11TH STREET, ROOM 500
AUSTIN, TEXAS 78767

COURT REPORTER: ARLINDA RODRIGUEZ, CSR
501 WEST 5TH STREET, SUITE 4152
AUSTIN, TEXAS 78701
(512) 391-8791

Proceedings recorded by computerized stenography, transcript produced by computer.

13:31:55 (Open court)

13:31:55 THE COURT: What we have scheduled for today are the defendants' motions to dismiss in Cause Number AU:18-CV-500, *Whole Woman's Health Alliance*, and others *v. Paxton*, and others.

13:32:12 Let me start with the plaintiffs, and announce who you are and who you represent, please.

13:32:18 MS. TOTI: Stephanie Toti for the plaintiffs, Your Honor.

13:32:22 MR. RODRIGUEZ: Juanluis Rodriguez for the plaintiffs.

13:32:27 MS. SHARMA: Rupali Sharma for the plaintiffs.

13:32:29 MR. O'CONNELL: And Pat O'Connell for the plaintiffs, Your Honor.

13:32:41 THE COURT: And for the defendants?

13:32:41 MR. STEPHENS: Your Honor, Andrew Stephens with the Office of the Attorney General for the State defendants and the University of Texas Systems. And I'm here with Adam Biggs, also from the Attorney General's Office, Beth Klusmann, and Heather Hacker from the Office of the Solicitor General.

13:32:52 THE COURT: All right. Before we do anything -- oh. We have others.

13:32:54 MR. STEPHENS: We also have the County defendants.

13:32:55 THE COURT: I see them now. You were blocking them out.

13:32:57

13:32:58 MS. DIPPEL: I'm standing now. I'm very short.

13:33:01 THE COURT: All right.

13:33:01 MS. DIPPEL: I'm Leslie Dippel. I'm here on behalf of County Attorney David Escamilla. And with me is Patrick Pope and Mr. Gabe Hodge.

13:33:07 THE COURT: All right. I want to ask you a couple of questions about this case before we get started. We have been through it in my chambers fairly carefully, and it has gained a lot of weight for something that all we've done is progress to the motion to dismiss stage.

13:33:30 Motions to dismiss should be sparingly granted and based pretty much on a legal premise as to whether or not there is any way that a plaintiff can plead a case in such a way that the law does not compel dismissal.

13:33:55 In reviewing the complaint and the response and the motions to dismiss, it looks to me like this case is not exactly what it appears to be in the complaint. So I want to address this initially to the plaintiffs: It looks like for sure in at least one motion you may be arguing something that is somewhat different than what you pleaded in your complaint. Both sides now have had an opportunity after the complaint was filed, and in going through this briefing process leading up to where we are today, to review everything in detail in this case.

13:34:49 So let me ask whoever wants to speak first for the

plaintiffs: Is this case still the same as it was when it was filed, or has it morphed somewhat and are all of the arguments still valid or are there new arguments you intend to make or would like to make?

MS. TOTI: Good afternoon, Your Honor. Stephanie Toti for the plaintiffs. The case is still as we filed it. There are no new claims, no new arguments in the case. I think there may have been some confusion about Plaintiffs' undue burden claim, whether we were pleading some kind of novel undue burden claim. But we're not.

We've challenged five categories of laws; and for all of the laws within each of those categories, we intend to demonstrate that it's an undue burden and will simply ask the Court to consider the full context in which the law operates. But there is no -- we never intended to plead anything different, and that hasn't changed.

THE COURT: Well, I can tell you it appears somewhat that you have taken a somewhat different tack in your response to the motion to dismiss than you do in the complaint. And so here is my concern with this: I really hate to deal with a matter on motions to dismiss and either grant one or more motions or overrule one or more motions and run the risk of the case going to the appellate courts when it is not absolutely clear what has been pleaded and argued, and I'm having a problem with that.

13:36:58 To shift to the other side -- and I want to hear from
13:37:01 Mr. Stephens in a minute -- I know I granted additional pages
13:37:06 for this. And, as you know, my policy is generally always to
13:37:10 grant additional pages because I believe that both sides ought
13:37:15 to be able to make their record in a district court as well as
13:37:18 you can make it and, if you can go forth and reverse me, power
13:37:24 to you. But I think the State overplayed its hand a little
13:37:28 bit. I think one of my motions is 73 pages long or pretty
13:37:33 close to it. It's the State defendant's motion. I can make an
13:37:41 argument to you that, if it takes 73 pages to tell me why I
13:37:44 should dismiss a case, maybe it probably shouldn't be
13:37:49 dismissed.
13:37:50 The local rules which provide for 20 pages, I can
13:37:55 tell you after having done this for a while, are adequate
13:38:04 except in the rarest of circumstances. The committee that
13:38:08 drafts those rules is not a bunch of judges that sit around and
13:38:12 try to figure out how to reduce their dockets. The committees,
13:38:19 by a substantial margin, the majority, is made up of practicing
13:38:23 lawyers within the Western District of Texas, and then there's
13:38:25 a sprinkling of one or two magistrates and one or two district
13:38:29 judges on it. So when we come up with this 20-page maximum,
13:38:35 then that is not anything other than the lawyers' peers
13:38:42 believing that it can get done in that.
13:38:46 I certainly, in going through this, have found that
13:38:50 73 pages probably confuses me. And that is something that I

13:38:56 don't care for, because when I write an opinion in this case
13:39:01 and I rule on these motions to dismiss, I want the appellate
13:39:07 courts to know exactly why I ruled on the case the way I did
13:39:12 and that I don't get bogged down and write on some issue that
13:39:18 perhaps I didn't need to write on or is confusing to the
13:39:22 appellate courts.
13:39:23 So what I want to talk to you -- Mr. Stephens, let me
13:39:27 hear from you, and then I want to talk to both of you a minute
13:39:32 on this. What I'm after is: Is there a way that we can
13:39:36 simplify what we're arguing about today and simplify the record
13:39:40 that is going to be ultimately presented to an appellate court
13:39:45 if one or the other of you appeals, because from where I sit
13:39:49 right now, I've got to presume there's going to be an appeal.
13:39:52 And if there isn't -- we're ahead of the game, but if I presume
13:39:57 there's not going to be an appeal, then there for sure is going
13:40:00 to be an appeal. So tell me what the State's position is on
13:40:03 this.
13:40:03 MR. STEPHENS: Andrew Stephens for the State.
13:40:05 And I'll just respond briefly, Your Honor.
13:40:06 Ms. Klusmann is going to handle the bulk of our argument today.
13:40:09 THE COURT: So you're just up to throw her under the
13:40:11 bus?
13:40:13 (Laughter)
13:40:13 MR. STEPHENS: No. The length of our brief -- and I
13:40:18 certainly understand that it's a lengthy brief -- we needed

those pages because the plaintiffs in this case chose to challenge over sixty laws and regulations in the state. And so what Plaintiffs are doing is essentially challenging the entire state regulatory system. And so we felt that we needed to address each of those laws, many of which the United States Supreme Court and the Fifth Circuit have expressly held to be constitutional, in that brief so that the Court would understand the framework of what this case really is. I won't go further than that because I know Ms. Klusmann will be explaining that in more detail in our argument.

THE COURT: So, Ms. Toti, is Mr. Stephens correct, that you're challenging -- is that what I missed in this case, that you were challenging the entire regulatory system of the State of Texas?

MS. TOTI: No, Your Honor. I would disagree with that characterization. The plaintiffs are challenging abortion restrictions that fall within five specific categories. And we've identified the specific laws that we're challenging in the complaint and the regulations that -- you know, that then correspond to those laws. It's not the entire regulatory system and not even the entire regulatory system for abortion. And we've identified very specifically in the complaint all of the laws that would continue to regulate abortion, even if the ones we are challenging are struck down.

What we are trying to demonstrate is that, once upon

a time, Texas started out with a reasonable regime for regulating abortion procedures and, over time, the State has added incrementally more laws and more burdens that are not reasonable. And the system has become so burdensome and unwieldy now that it's incredibly difficult for patients and providers to navigate. So we're asking the Court to strike down those laws that we believe constitute an undue burden, but it's far from every law in the state of Texas that regulates abortion.

THE COURT: Well, then let me tell each of you this. Ms. Klusmann, Ms. Toti, you're going to handle the argument?

MS. TOTI: Yes, Your Honor.

THE COURT: What I want you to do -- I'm going to hear argument today. But I want you to pare it down to as few words as you can make -- take under 30 minutes if you can -- on why a motion to dismiss is appropriate. That's all I want to know.

And I'm going to tell you, if after I hear this argument and I go back and review what we have, that I may not rule and I may order both sides to replead this case, to take out a lot of the verbiage and get it down to exactly the issue that you're talking about Ms. Toti. Because, honestly, when I read through all of this, most recently this weekend -- all of it I could stand this weekend -- I did not see it as that simple a case. I was concerned about what we have.

13:43:29 And I think we have far too much here in the way of
13:43:32 pleadings. I don't think it -- it is harder to write less than
13:43:36 it is to write more. And I was on your side of the bench for
13:43:39 28 1/2 years, and I constantly was having to tell myself you've
13:43:44 got to pare this down, you've got to pare this down, you've got
13:43:46 to pare this down.
13:43:47 Cases, particularly cases that involve the policy
13:43:51 arguments and the political situation that occur in cases that
13:43:57 have issues like this, need to be something that not only the
13:44:04 court understands and -- and by that I mean the court at every
13:44:07 level, whether it goes to the Circuit Court or the Supreme
13:44:09 Court -- and that the public understands. Because I certainly
13:44:14 don't think any member of the public -- there may be a few of
13:44:18 you out there and few of you elsewhere -- could pull up these
13:44:21 pleadings on the website and have a really well-founded idea of
13:44:27 what it is we're really going to argue today. So let me see
13:44:32 where we get with this argument, but I find this case difficult
13:44:38 to understand at this point with the status of the record.
13:44:44 So, with that having been said, it's the State's
13:44:48 motion. Ms. Klusmann, you may proceed, and then are you going
13:44:52 to argue all of it, or are you going to leave some time for
13:44:54 Ms. Dippel or how are you going to divide this up.
13:44:57 MS. KLUSMANN: Your Honor, I will begin with
13:44:59 20 minutes. Ms. Dippel will then go for five and reserve five
13:45:02 for rebuttal.

13:45:03 THE COURT: Okay. Are you going to keep track of
13:45:07 your own time, or do you want me to?
13:45:07 MS. KLUSMANN: I think we -- I think Ms. Oakes,
13:45:11 right, was going to let me know when my 20 minutes are up.
13:45:14 THE COURT: That's fine. I just wanted to know.
13:45:16 All right. You may proceed.
13:45:37 MS. KLUSMANN: Good afternoon, Your Honor.
13:45:38 Beth Klusmann for the State defendants.
13:45:40 May it please the Court: Plaintiffs newest lawsuit
13:45:45 asks the Court to take the rather extraordinary step of
13:45:49 declaring unconstitutional nearly every statute and rule in
13:45:51 Texas related to abortion. I take issue with Ms. Toti's
13:45:55 description of this case. Right now we are challenging every
13:45:59 single regulation that applies to abortion facilities, nearly
13:46:05 every statute in chapter 171, which applies to the provision of
13:46:09 abortion, nearly every statute in chapter 245, which applies to
13:46:14 the regulation of abortions facilities, and I would at least
13:46:16 half of the statutes related to the provision of abortion to
13:46:20 minors. It's probably easier to list the statutes that are not
13:46:25 being challenged than it is to list all of the statutes that
13:46:28 are being challenged.
13:46:29 Now, unlike the cases that you have previously heard
13:46:32 between these parties, these are not newly enacted laws that
13:46:35 are unique to Texas. They are laws that have been on the books
13:46:39 for years, some of them for decades, and they are common across

13:46:43 the states. And, finally, the idea that they all pose a
13:46:48 substantial obstacle to abortion is absurd on its face.
13:46:52 Some of the laws being challenged today include
13:46:54 requiring abortion facilities to sterilize their instruments
13:46:58 and allowing a woman to withdraw her consent to the abortion
13:47:02 and providing the woman with the name of the physician who will
13:47:05 be performing the procedure.
13:47:07 So what has caused Plaintiffs to conclude after all
13:47:11 of these years that these laws have suddenly become
13:47:14 unconstitutional? They are overreaching based on the Supreme
13:47:18 Court's decision in *Whole Woman's Health v. Hellerstedt*. They
13:47:22 believe that *Hellerstedt* ushered in a new era of abortion
13:47:26 jurisprudence where everything that has been long established
13:47:28 must now be questioned and challenge and weighed.
13:47:31 But *Hellerstedt* did not do that. The majority in
13:47:34 *Hellerstedt* said it was simply following what the Supreme Court
13:47:37 had already required in *Casey*. And this was confirmed just
13:47:41 last year by the Fifth Circuit in *June Medical Services v. Gee*.
13:47:46 There the Fifth Circuit said, yes, all *Hellerstedt*
13:47:50 did was apply *Casey*, and so the *Casey* standard still applies
13:47:53 today. Therefore, anything constitutional under *Casey* remains
13:47:59 constitutional today. We don't have to retry all of these
13:48:02 cases.
13:48:02 The argument I expect you'll hear from plaintiffs is
13:48:05 that the facts are different in Texas. *Casey* concerned laws in

13:48:08 Pennsylvania; *Akron* concerned laws in Ohio. But that's simply
13:48:12 not the case. It is no more difficult for a physician in Texas
13:48:16 to fill out a report following an abortion than it was for a
13:48:19 physician in Pennsylvania to do the exact same thing, and *Casey*
13:48:23 upheld that law. It is no more difficult for a minor in Texas
13:48:28 to prove maturity by clear and convincing evidence than it was
13:48:32 for a minor in Ohio. And the Supreme Court upheld that rule.
13:48:36 For many of the statutes and rules, it's not actually
13:48:40 possible to come up with a set of facts that would demonstrate
13:48:43 that they are a substantial obstacle to abortion for a large
13:48:47 fraction of women in Texas, and that is the test that this
13:48:50 Court must apply.
13:48:51 Permitting this case to move forward and why we are
13:48:55 focused on this motion to dismiss, even just to the discovery
13:48:58 process, would be a very large waste of time and resources.
13:49:02 The State should not have to justify long-established laws by
13:49:06 hiring experts to testify that infection control procedures are
13:49:10 beneficial, that having sinks and a functioning toilet, or that
13:49:18 facilitating a woman's safety and comfort is beneficial.
13:49:20 The Court knows what litigation between these parties
13:49:23 is like. You know what our discovery disputes are like. You
13:49:26 know how we bring in experts. You know how we question
13:49:29 everything. And that was just for one or two laws. We've got
13:49:32 over sixty here. So that is way we are focused on this motion
13:49:35 to dismiss. Even if the Court doesn't get rid of all of it, it

absolutely must be narrowed before we proceed any farther in this case. But for the reasons I will describe, this entire case should be dismissed because Plaintiffs' claims are meritless and they lack standing.

THE COURT: Is it possible for over a period of years a state, any state, to enact laws that, at the end of the day, have a cumulative effect of creating a substantial burden to a woman's right to an abortion even though each one of them standing alone may not be of such a magnitude as to create that burden?

MS. KLUSMANN: I don't think so, Your Honor. And that's the cumulative burden claim that we talked about. And Ms. Toti said that's not what they're alleging today; that they are alleging these laws individually pose a substantial obstacle. But recognizing that type of claim would create jurisdictional problems with causation and redressability. If no individual law is unconstitutional, how do you craft a solution to that. How do you trace causation?

You know, if we used the ASC law, for example, you can see a clinic shut down because it was not an ambulatory surgery center and, therefore, that was more difficult for women to have an abortion then.

But here we've got which law put them over the top? Was it the reporting requirement that caused clinics not to open or women to be unable to get abortion? Is it the fact

13:51:09 that they have to put their license number on an advertisement? I just don't think that can -- that's not going to work in this case. And the solution cannot be to strike them all down, so you would have to simply pick a few and see if that relieved whatever burden was out there and, if that didn't work, maybe pick a few others.

It would essentially require the Court to rewrite abortion legislation in Texas. And so I don't think such a claim should be recognized, and the Supreme Court has yet to recognize such a claim.

THE COURT: Well, has the Supreme Court ever been presented with such a claim?

MS. KLUSMANN: I don't know if anyone has made that specific argument. But, if you look at their precedence, they always consider them individually. I think that -- I'm sorry. I can't recall which case. There was a dissent that said you should be considering them all together, and the court didn't do that. I don't recall if the parties made that specific argument. But, you know, if you look at their cases, there's a section on admitting privileges, a section on ambulatory surgical. You know, they just go law by law in their analysis.

THE COURT: So they haven't specifically directed themselves to that argument, but they also have not specifically rejected the argument.

MS. KLUSMANN: I would point to their response on

page 18 at note 8 where they say they are not bringing -- because it would be a novel claim, and Ms. Toti just said we're not bringing this novel claim, we are challenging them all individually. And so we are taking them at their word for now, that that is not the claim they are bringing. But, obviously, you know, if the case proceeds further, we'll see if that's what their intention is.

I would like to spend a little time first off on standing, move to a few examples of our 12(b)(6) arguments just to sort of illustrate what we're dealing with here, and then talk about the chancellor for the university systems because he's kind of the odd man out in all of this litigation.

First as to standing as to the provider plaintiffs, Dr. Kumar and Whole Woman's Health Alliance, they rely primarily on third-party standing and cite the rule that standing is typically granted to abortion providers to assert the constitutional rights of their patients. But this is not a typical case. As we said, those previous cases have involved the one to two laws. This case involves dozens, including every single health and safety regulation that apply to abortion facilities.

Now, the plaintiffs do have to prove third-party standing because what they are essentially doing is coming into court and standing in the shoes of their patients. They are saying I will assert the claims my patients want me to assert.

13:53:36 I will protect their best interests. But in this case, like I
13:53:40 said, Plaintiffs have challenged all of the health and safety
13:53:42 regulations, they've challenged all of the informed consent
13:53:45 procedures which allow women to make fully informed choices.
13:53:49 According to Plaintiffs, if women were here in this
13:53:52 court today, they would ask this Court to strike down the
13:53:55 infection control procedures that are applied to abortion
13:53:59 clinics. They would say it is unconstitutional to cap the
13:54:03 amount that could be charged for an ultrasound. Women
13:54:07 therefore want, apparently, according to plaintiffs, to be able
13:54:09 to pay more money for their ultrasound. They would ask to be
13:54:13 kept in the dark about the drugs that they are being
13:54:16 prescribed. That is nonsensical, to think that women would
13:54:19 come into court and want this to be the law.
13:54:22 So what are the providers' interests in this case?
13:54:24 If we look at paragraph 196 of their complaint, they envision a
13:54:28 world in which all of these laws have been struck down and that
13:54:31 abortion providers will have more diverse revenue streams and
13:54:35 their medical practices are economically sustainable.
13:54:38 So right now this case does in fact pit the
13:54:41 providers' financial interests against the interests of the
13:54:45 women whose rights they claim to be representing. The Court
13:54:48 should not allow that conflict of interest to stand and should
13:54:51 deny third-party standing.
13:54:53 The same applies to the Fund plaintiffs. The Fund

plaintiffs are five entities that assist women in paying for abortion. They have absolutely no rights at stake in this litigation because they don't have to comply with any of these laws. Again, their interest is purely financial. They want their dollar to go further. And they are doing so, again, at the expense of the health and safety interests of their patients -- excuse me -- their clients.

And I think it is telling that their first defense when we challenge their standing is that it doesn't matter if they have standing because Dr. Kumar has standing and, as long as one person has standing, we can move forward. That may be the case in an appellate court where the appellate court is going to have to decide the legal issue regardless of how many plaintiffs bring it, but it is far from the case in a trial court.

If you consider it from a discovery perspective, are we going to have to take discovery from two plaintiffs or are we going to have to take discovery from seven plaintiffs? Are we going to receive discovery from two plaintiffs, or are we going to receive discovery from seven plaintiffs? You don't get to tag along in a lawsuit just because someone else has standing. You don't get to impose burdens on litigation just because someone else has standing.

And then just one final note on standing is there is a causation problem. Plaintiffs' lawsuit basically says that

someday, somewhere, someone might want to open a clinic in Texas, and some of these laws -- we're not sure which ones -- might make that harder for them to do so. Those "someday" intentions, according to *Lujan*, are not sufficient to support standing and they are not sufficient to support a ripe claim.

So for those reasons we would ask the Court to grant our 12(b)(1) motion.

Moving to 12(b)(6), just a few sort of broad points, and then I'll illustrate with a few examples. Again, Plaintiffs claims are barred by existing precedent. *Hellerstedt* did not change that. And they can't get around that precedent by claiming that their facts are different. They have to allege facts under Rule 8 that demonstrate a substantial obstacle to a large fraction of women in Texas. And their complaint gives no -- nothing in their complaint suggestions that this will be possible.

So let's try the physician-only requirement. No less than five Supreme Court cases have said that states may restrict the performance of abortion or the informed consent process to physicians. This actually originated in *Roe v. Wade* at page 165. The court there said: A state may define a physician to mean those licensed by the state, and it may restrict the performance of abortion to those physicians. That was again repeated or affirmed in *Connecticut v. Menillo*, *City of Akron*, *Casey*, and *Mazurek*.

So this is as close to a pure issue of law as we're going to see in this case. Now, if Plaintiffs come back and may want to say, well, the facts in Texas are different, they haven't pleaded anything different. There is no allegation anywhere in their complaint that there is any nonphysician in Texas who wants to perform abortions and is being barred from doing so. There is no allegation in their complaint of where this hypothetical person might be, how this hypothetical person might ease the burden on women. And there's no allegation that opening up the performance of abortion to nonphysicians would eliminate any burden that women supposedly face right now. There is no reason to call into question decades of Supreme Court precedent and allow the physician-only complaint to go forward.

Plaintiffs challenge to the facility licensure requirements demonstrates the absurdity of many of their claims as well as the reasons why we need to address this now, before having to engage in expensive discovery.

Roe again said that states could require abortion facilities to be licensed. And it said of course you can do so, for health and safety reasons, to ensure the safety of patients. Now, if you look at the Fourth Circuit opinion we cite, *Greenville Women's Clinic v. Bryant*, they considered many of these same regulations and upheld them, noting that they were actually very similar to the standards proposed by the

13:59:08 National Abortion Federation and ACOG. Plaintiffs don't
13:59:11 address any of this. They just say that they are, quote,
13:59:14 medically inappropriate, end quote.
13:59:16 But, again, we are talking about sterilization and
13:59:19 infection control, having clinical policies that govern the
13:59:24 provision of care, requiring training for employees, requiring
13:59:27 a physician, a physician assistant, or a nurse to be present
13:59:31 when a patient is in surgery or in the recovery room. These
13:59:35 are normal regulations of medical facilities, and they are not
13:59:39 new. Most of these can be traced back to the '80s.
13:59:42 And so if we're looking at challenging them now in
13:59:46 terms of discovery, that's the time period we're going to have
13:59:49 to cover. We're going to be starting in 1985 and figuring out
13:59:53 why these were enacted then, what was the purpose, was there a
13:59:56 need for them, and trace that all the way back through to
13:59:59 today.
14:00:00 Now, these regulations may be specific to abortion
14:00:02 facilities, but they are not unique to them. If you look at
14:00:05 other state regulations of medical facilities, such as for
14:00:09 birthing centers or for end-stage renal disease facilities,
14:00:13 you're going to see the exact same thing: sterilization and
14:00:16 infection control; policies and procedures; functioning
14:00:20 toilets, sinks, and handwashing stations. The abortion
14:00:24 facilities are regulated as medical facilities are regulated.
14:00:31 A quick point on medication abortion: Plaintiffs

challenge the requirement that the woman -- the physician physically examine the woman prior to performing the -- or prescribing the drugs. Plaintiffs call this medically unnecessary but it is necessary to determine whether the pregnancy is ectopic because, as was noted in the *Planned Parenthood v. Taft* case, it's contraindicated for ectopic cases, a medication abortion is, and at least one woman has died as a result of taking those drugs.

Plaintiffs offer no explanation how they're going to determine whether a woman has an ectopic pregnancy other than through a physical exam. Their quest to not have to perform that exam is unconscionable. No more-diverse revenue streams is worth endangering women.

My final example is the 24-hour waiting period. This was constitutional under *Casey*, and Texas law is actually less burdensome because it has an exception for women who must travel more than 100 miles. So, as a matter of law, *Casey* said a 24-hour waiting period is fine. Texas's is even less burdensome.

And if you look at what the district court found in *Casey*, the district court found that there would be a minimum of two trips, delays of 48 hours to two weeks, additional exposure to harassment, travel of one to three hours for many women, loss of wages, increased complications, and significant impacts on the poor and young. The Supreme Court recognized

14:02:02 all that, acknowledged all that, and said that is insufficient
14:02:05 to demonstrate that those burdens outweigh the benefits of the
14:02:10 24-hour waiting period.
14:02:11 Paragraphs 165 to 180 of Plaintiffs' complaint, they
14:02:15 use more words, but it's the same burdens: travel delay and
14:02:19 costs. There is no allegation that this is a -- causes a
14:02:23 substantial obstacle to a large fraction of women in Texas.
14:02:28 My time is running short. I want to make sure I get
14:02:31 to Chancellor Milliken, as that is one of the claims that has
14:02:35 been a little hard to get our hands around. The current theory
14:02:40 as expressed in Plaintiffs' response to our motion to dismiss
14:02:43 is that the chancellor violated the United States Constitution
14:02:46 because an unknown employee at the University of Texas at
14:02:48 Arlington rejected the Lilith Funds' application to host
14:02:53 college interns.
14:02:54 So this does actually present us with an opportunity
14:02:57 to return to the original principles behind *Ex parte Young*.
14:03:01 Injunctive suits against state officials are barred unless they
14:03:04 are actually violating the law. Well, there are no allegations
14:03:08 that the UT chancellor had anything to do with the denial of
14:03:14 the Lilith Fund's application. There is no statute, there is
14:03:17 no board rule, there is no regulation that puts him in charge
14:03:20 of making that decision.
14:03:21 This case is therefore unlike cases in which a
14:03:24 statute or regulation puts, say, the Attorney General or the

14:03:27 head of an agency in charge of something, and they delegate
14:03:31 that to someone else. Here, Chancellor Milliken had absolutely
14:03:35 no involvement with that decision, and there's no statute that
14:03:37 told him he should be involved. Therefore, because he did no
14:03:41 wrong, his sovereign immunity remains intact, and he cannot be
14:03:45 sued under *Ex parte Young*.
14:03:48 I think I have used just about all of my initial
14:03:50 20 minutes. I will obviously rely on our briefing, extensive
14:03:55 as it was, for the rest of our arguments. But I will turn it
14:03:58 over to Ms. Dippel.
14:04:00 THE COURT: Thank you.
14:04:08 Ms. Dippel, this may be the first time in my career
14:04:10 that, when somebody spoke second, they actually get the time
14:04:13 they were promised by their colleague. Usually, you can just
14:04:18 count on getting less time than the way you worked it out. So
14:04:21 you may proceed.
14:04:23 MS. DIPPEL: Thank you. Thank you, co-counsel, and
14:04:25 may it please the Court:
14:04:26 Opposing counsel and co-counsel, we appreciate how
14:04:28 well we've all been working together culminating in this
14:04:32 hearing today.
14:04:32 But Travis County Attorney David Escamilla has moved
14:04:36 to dismiss this lawsuit against him because he is unnecessary
14:04:39 to the relief that Plaintiffs seek. I don't intend to repeat
14:04:42 the reasoned argument of the State, but I do want to highlight

14:04:45 1 the unique status of David Escamilla, as the elected
14:04:49 2 misdemeanor prosecutor in Travis County on these facts makes
14:04:53 3 him unnecessary to the substantive question of this lawsuit.
14:04:57 4 The substantive issue in this lawsuit is the
14:04:59 5 constitutionality of the State statutes, a question over which
14:05:05 6 he has no control or authority other than prosecuting,
14:05:08 7 potentially, criminal statutes that are on the books. If a
14:05:13 8 statute is determined to be unconstitutional, there's not a
14:05:15 9 statute for which he could prosecute.
14:05:19 10 Our arguments are mainly regarding standing and
14:05:22 11 ripeness. First, of course, to establish standing a plaintiff
14:05:27 12 must have suffered an injury-in-fact. And to establish an
14:05:31 13 injury-in-fact, a plaintiff must show that he or she has
14:05:34 14 suffered an invasion of a legally protected interest that is
14:05:37 15 concrete and particularized, not conjectural or hypothetical.
14:05:43 16 That's a quote from the *Spokeo, Incorporated* case, the Supreme
14:05:44 17 Court case.
14:05:45 18 When contesting the constitutionality of a criminal
14:05:48 19 statute, it is not necessary that a plaintiff first be exposed
14:05:51 20 to an actual arrest or prosecution to be entitled to challenge
14:05:54 21 that statute, but they must have fear of a state prosecution
14:06:00 22 that is more than a imaginary or speculative. That case has
14:06:04 23 come from younger very -- that quote comes from the *Younger v.*
14:06:08 24 *Harris* case. Otherwise, they lack standing.
14:06:11 25 So, with that background, the plaintiff has to prove

14:06:13 that there's a credible threat that is more than speculative.
14:06:17 Plaintiffs do not allege facts establishing those two
14:06:22 components to establish standing against the county attorney.
14:06:25 For example, the Plaintiffs Texas Choice, Lilith
14:06:28 Fund, or Texas Equal Fund, all funds plaintiffs, are nonprofit
14:06:32 organizations that only provide informational and financial
14:06:35 resources, as you've already heard. They do not perform those
14:06:38 services and are not subject to those acts and, therefore,
14:06:41 certainly not subject to prosecution by the county attorney.
14:06:44 Also Whole Woman's Health Alliance and Dr. Kumar do
14:06:47 not allege a credible threat of prosecution by the county
14:06:50 attorney. Neither plaintiff alleges facts that the challenged
14:06:53 criminal penalties have or will imminently be applied to them.
14:06:58 They only assert that those criminal penalties exist and apply
14:07:02 their general applicability to them as providers. *Younger v.*
14:07:07 *Harris* informs that this is not enough to establish standing.
14:07:10 As I've said, of course, Plaintiffs do not have to
14:07:13 wait to be prosecuted to establish standing, but they have to
14:07:16 at least assert facts articulating a credible threat of
14:07:20 prosecution. And neither plaintiff alleges they are subject to
14:07:23 a pending prosecution, subject to an investigation of a
14:07:26 criminal statute or that a prosecution is likely, or that any
14:07:31 of their current or future conduct is in or could be in
14:07:34 violation of the complained of laws. They have not alleged
14:07:37 they have even been contacted by the county attorney or any

prosecutor.

Even if plaintiffs have not, but intend, to violate the named statutes, they still have not shown the intention to engage in a course of conduct arguably affected that would provide the basis for a credible prosecution thereunder. The basic tenet is that there has got to be some exposure to prosecution that is more than speculative.

I quote from the *Empower Texans* case out of the Western District of Texas in the Midland Division. *Empower Texans v. Nodolf*: Empower Texans had filed a lawsuit against District Attorneys for Midland, Tarrant, and Travis Counties and the Texas Attorney General, seeking to enjoin them from initiating an investigation or prosecution of another law. They allege the statute violated their rights under the First and Fourteenth Amendments. And in that case there was a complaint by a citizen sent to the DA's office, and the DA had -- one DA in the office had commented that that complaint was under review.

The judge granted motions to dismiss on standing grounds, finding that they did not establish an injury-in-fact. The court reasoned that the fear of prosecution based on a citizen complaint and an acknowledgment that it was received and under review, the did not provide standing. And here the plaintiffs have alleged even less against the county attorney.

The county attorney has also raised ripeness grounds

14:09:05 that are similar. Of course, a claim is not ripe for
14:09:08 adjudication if it rests upon contingent future events that may
14:09:12 not occur as anticipated. Same set of facts, same -- same
14:09:17 background of the law, that you have to prove something that is
14:09:19 more than conjecture or speculative. They have not asserted a
14:09:24 qualifying hardship in order to render their claims ripe for
14:09:29 review by this Court.
14:09:30 It is important to note, as has already been
14:09:33 mentioned, that based upon the allegations in the complaint,
14:09:36 the majority of all of these statutory revisions have been on
14:09:38 the books for years and some for decades. There being no
14:09:41 allegation of a prosecution thereunder is further evidence that
14:09:44 a fear of such prosecution is merely speculative and
14:09:48 conjectural.
14:09:49 The plaintiffs themselves also acknowledge that the
14:09:50 challenge of the criminal penalty portion is secondary to the
14:09:53 Court's determination of constitutionality. And I quote from
14:09:56 their response to State's motion to dismiss, page 14:
14:09:59 Plaintiffs do identify the imposition of certain criminal
14:10:02 penalties on abortion providers as an additional constitutional
14:10:07 violation.
14:10:07 But they make this claim in the alternative to their
14:10:11 claim that it's substantive that the challenged laws are
14:10:13 unconstitutional. In other words, Plaintiffs ask the Court in
14:10:15 the first instance to strike down the substantive provisions.

Should the Court do so, Plaintiffs' claims against the criminal penalties are moot.

Plaintiffs themselves have told you that we're a secondary thought. We only come into play should there be a constitutional statute, that there has been been more than a credible threat, and prosecution exists. *Baker v. Wade* tells us the Texas Attorney General is the appropriate representative to defend those statutes. We're just here for the prosecution of same, should they become constitutional, should there even be an allegation of such.

The District Court should decline to issue an injunction where there's no allegation or proof that a prosecutor would not comply with its decision should there be one. There's been no allegation at all, no allegation of fact, that the county attorney would not comply with the Court's order.

And for all of those reasons, Defendant Escamilla requests the claims against him be dismissed in his official capacity and as representative of all the prosecutors.

THE COURT: Thank you.

Ms. Toti, will you carry all of the argument for the respondents?

MS. TOTI: Yes, Your Honor.

THE COURT: All right. Then you may argue straight through for 30 minutes.

MS. TOTI: Thank you. Your Honor, there are two preliminary issues that I wish to address. The first is that Plaintiffs agree with the State that the Supreme Court decision in *Whole Woman's Health* did not alter in any way the Supreme Court's earlier decision in *Planned Parenthood v. Casey*. But the *Whole Woman's Health* decision did abrogate the Fifth Circuit's undue burden jurisprudence.

The Supreme Court recognized that the Fifth Circuit had been applying, essentially, a rational basis test to abortion restrictions for decades, wrongly so, and upholding laws that should have been struck down. So when the State says that we are seeking to challenge laws that have been on the books for years and haven't previously been questioned, their position fails to take into account that the governing circuit law that was in effect for all of that time has now been overruled, and laws that went unchallenged under a rational basis standard are now worthy of scrutiny under the correct standard, as the Supreme Court articulated in *Whole Woman's Health*.

Secondly, I'd like to note that if the statutory licensing requirement for abortion providers that plaintiffs have challenged is struck down, then all of the regulations implemented pursuant to that requirement must also be struck down.

This Court and the Supreme Court addressed a very

14:13:10 similar issue in *Whole Woman's Health* where the plaintiffs had
14:13:14 challenged an ambulatory surgery center requirement, and the
14:13:18 State of Texas had argued that the Court ought to consider
14:13:22 every single ambulatory surgical center regulation in isolation
14:13:28 and upheld the ones that did not, in and of themselves, impose
14:13:32 an undue burden, like the handwashing requirements and the
14:13:35 functional toilets and so on. And, ultimately, this Court and
14:13:38 the Supreme Court decided that the regulations can't be severed
14:13:42 from the statutory requirement. If the statute falls, the
14:13:46 regulations must fall.
14:13:48 And so the State is essentially constructing a
14:13:50 straw man by focusing on those regulations adopted pursuant to
14:13:55 the licensing requirement. The real issue is whether the
14:13:58 licensing requirement itself imposes an undue burden. And, if
14:14:02 it does, then all of the regulations adopted pursuant must be
14:14:06 struck down.
14:14:10 Your Honor, I'd like to turn to address the
14:14:13 Plaintiffs' standing briefly and then go on to address the
14:14:18 merits of Plaintiffs' claims, also briefly.
14:14:23 It's well settled that abortion providers have
14:14:26 standing to assert the rights of their patients. Controlling
14:14:28 Fifth Circuit case law establishes that both physicians who
14:14:31 provide abortions and clinics that provide abortions have
14:14:36 standing to assert their patients' rights. *Plant Parenthood v.*
14:14:40 *Abbott*, decided in 2014, addresses physician standing, and

Deerfield Medical Center, decided in 1981, addresses clinic standing. There's been no intervening development in the law that abrogates either one of those cases with respect to the standing issue.

Defendants' contention that abortion providers' interests conflict with their patients' interests has been repeatedly rejected by this Court and the Fifth Circuit. Tellingly, Defendants haven't been able to cite a single case from any jurisdiction in which a court found that such a conflict of interest exists and should defeat the standing of abortion providers.

Defendants' conflict of interest argument is really an attempt to shoehorn their position on the merits of Plaintiffs' claims into an argument about standing. Defendants contend that the challenged laws provide net benefits to patients, and so, therefore, it's in the patients' interests for the laws to be upheld. But whether those laws provide net benefits to patients is a disputed factual issue that goes to the heart of plaintiffs' undue burden claims.

If in fact the State is correct and those laws are more beneficial than burdensome, then Plaintiffs will lose on the merits. But Plaintiffs fully intend to bring forth evidence to demonstrate that those laws are not more beneficial than burdensome, that, in fact, they impose undue burdens on their patients and that they should be struck down.

14:16:18 But the case law makes clear that the merits inquiry
14:16:22 is distinct from the standing inquiry. And to uphold the
14:16:27 plaintiffs' standing, the Court doesn't need to make a
14:16:29 determination about the likelihood of their success on the
14:16:32 merits, only that they have a sufficient stake in the outcome
14:16:35 of the proceedings and that the requirements for a third party
14:16:39 standing are met. Those requirements are having a close
14:16:44 relationship with the third party and that the third party
14:16:49 faces obstacles to asserting their own rights.
14:16:52 Here there is no question the State has made no
14:16:56 argument that abortion patients don't face obstacles to
14:17:00 asserting their own rights, and it's well established by the
14:17:02 case law that they do. So the only real issue is whether the
14:17:07 plaintiffs have the requisite close relationship with their
14:17:11 patients to satisfy the requirements for third-party standing.
14:17:17 And in this context "a close relationship" doesn't mean a
14:17:20 close, personal relationship. Rather, it means that the party
14:17:25 bringing suit will serve as an effective advocate for the third
14:17:30 party's rights.
14:17:30 So in *Singleton v. Wulff*, the Supreme Court explained
14:17:33 that the requirement is met where enjoyment of the right is
14:17:37 inextricably bound up with the activity that the litigant
14:17:39 wishes to pursue and where the relationship between the
14:17:42 litigant and the third party is such that the former is fully,
14:17:44 or very nearly as effective, a proponent of the right as the

latter.

That is certainly the case for the provider plaintiffs. They wish to provide abortion care, their patients wish to access abortion care, their interests are fully aligned, and the providers have every incentive to serve as effective advocates for their patients' rights.

This test is also satisfied for the Abortion Fund patients. The Funds are charitable organizations that assist people with unwanted pregnancies gain access to abortion. That's their mission. They have no financial stake in the performance of abortions, only a moral imperative to ensure that poverty doesn't prevent people from exercising their constitutional right to end an unwanted pregnancy.

The Fund plaintiffs satisfy the requirements of Article III for standing because the challenged laws require them to spend additional time and money to facilitate their clients' access to abortion care, and the case law makes clear that that kind of diversion of resources by a nonprofit organization constitutes an injury-in-fact for standing purposes.

Plaintiffs' briefs cite both *Havens Realty Corp.*, a Supreme Court case from 1982, and *OCA Greater Houston*, a Fifth Circuit case from 2017. Both of those cases involved nonprofit organizations that were involved in counseling clients or stakeholders, making referrals, helping them gain access to

services. And in each case the court held that the -- the laws or the state practices that were being challenged would require greater expenditure of resources by the nonprofit organization and would divert resources from its core motion, and that was sufficient to satisfy the requirements for standing.

With respect to the close relationship, the Fund plaintiffs will serve as effective advocates for their clients because their interests are completely bound up with their clients' interests. The clients seek to access abortion care; the Fund plaintiffs seek to help them access abortion care, and they have every incentive to be effective advocates for their clients' rights.

The Supreme Court has found the close relationship test to be satisfied by a wide variety of relationships, including criminal defendants and potential jurors excluded from jury service, that's *Powers v. Ohio*; a company selling nonmedical contraceptives and potential customers, including minors, that's *Carey v. Population Services*; beer vendors and potential customers, that's *Craig v. Boren*; and white property owners and potential black purchases, that's *Barrows v. Jackson*.

Contrary to Defendants' assertions, the Supreme Court's 2004 decision in *Kowalski v. Tesmer* did not abrogate any of those cases. *Kowalski* itself cites many of them with approval. It's also cites *Singleton v. Wulff* with approval.

And many of those cases were cited with approval in the Supreme Court's 2017 decision in *Sessions v. Morales-Santana* which also concerned third-party standing.

The Fifth Circuit's decision in Abbott came a full decade after *Kowalski*. The Supreme Court's 2016 decision in *Whole Woman's Health* didn't question the plaintiff abortion providers' standing to assert their patients' rights. Had there been any doubt about the Plaintiffs' standing in that case, the Supreme Court would have had an obligation to examine it *sua sponte*. So there's -- it is well settled that third-party standing is appropriate in this case, and the defendants cite no case law that suggests that those well-settled rules should not be applied here.

Turning to the merits of the case, the State defendants' motions completely ignore the standard for dismissal under Rule 12(b)(6). The Fifth Circuit has explained, relying on Supreme Court precedent, that a court evaluating a motion to dismiss under Rule 12(b)(6) must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiffs.

Just last year in the *Littell* case, the Fifth Circuit summarized the well-settled rule that to survive a motion to dismiss, a complaint need not contain detailed factual allegations. Rather, it need only allege facts sufficient to state a claim for relief that is plausible. It explained that

a complaint may proceed even if --

THE COURT: Well doesn't the line of cases -- all of the line of cases after *Iqbal* and *Twombly* say that there has to be a direct link in a pleading to a particular factual situation with regard to a particular party as opposed to just generally pleading the statute and saying that it's wrong as applied to a group? Do your pleadings accurately link up the facts to the allegations in your pleading on a case-by-case basis?

MS. TOTI: Yes, Your Honor. What the cases say -- and those standards I was citing were from Fifth Circuit cases decided in 2018, so they're not -- it's not old law. The allegations in the complaint can't be merely conclusory. So it's not enough for the plaintiffs to say: This law imposes an undue burden and is therefore unconstitutional. There need to be factual -- genuine, factual allegations to support the claim. But those allegations don't need to be detailed. A short --

THE COURT: Well, what is an allegation that is not a detailed allegation but is more than "the statute is unconstitutional"?

MS. TOTI: Your Honor, Plaintiffs' complaint identifies an array of specific burdens that the challenged laws impose on people seeking access to abortion, including that each of the laws makes abortion harder to access and less

affordable than it would otherwise be. Each of them stigmatizes abortion patients and delays them from accessing the care that they want if we're requiring them to be pregnant for a longer period of time.

THE COURT: Do your allegations point out those undue burden facts that you allege with regard to individual named plaintiffs or the individual patients?

MS. TOTI: Your Honor, the complaint alleges that all patients seeking access to abortion care, including -- so, therefore, including the patients treated by Plaintiffs on the day that the complaint was filed, those patients treated by Plaintiffs or assisted by the abortion funds today, and those who will be assisted at every stage of this litigation, are impacted by the laws. And the complaint further pointed out that for certain groups of people, including poor people, immigrants, people of color, those burdens are heightened, but for -- for everyone those burdens are substantial.

THE COURT: Well, what is your best authority that it can be pleaded that way? It seems to me that that comes close to just saying: Here's the statute. It's clear that it creates an undue burden on these particular people, including minority groups; therefore, we prevail. Is that what you're saying satisfies the pleadings standard, and, if so, what's your best authority on that? Because I'm concerned that the pleading jurisprudence in this country has gotten a lot tighter

than what you're describing to me, and I want to look at it very carefully.

MS. TOTI: I understand the Court's concern. The best authority, I believe, is the Littell case from the Fifth Circuit. And that's at 894 F.3d 616. And specifically --

THE COURT: Spell the name of the first party in that so I make sure I have it.

MS. TOTI: Yes. It's L-i-t-t-e-l-l, and it's cited in the Plaintiffs' brief. And specifically at page 622 of that opinion, the court says: To survive a motion to dismiss, a complaint need not contain detailed factual allegations. Rather, it need only allege facts sufficient to state a claim for relief that is plausible on its face.

I would also point out to the Court the U.S. Supreme Court's decision in *Johnson v. City of Shelby*, also cited in the Plaintiffs' brief. And that's at 135 S. Ct. 346. And it's only a one-page *per curiam* opinion decided in 2014, so quite recently. In there the Supreme Court held that the federal pleading rules do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.

That particular case concerned allegations of misconduct and unconstitutionality by municipal officials. The Court of Appeals dismissed the case because the complaint failed to cite Section 1983, and the court said that the legal

14:28:17 theory wasn't correctly articulated in the complaint. And the
14:28:21 U.S. Supreme Court reversed and reinstated the case, and it
14:28:25 said: Having informed the City of the factual basis for their
14:28:30 complaint, the plaintiffs were required to do no more than
14:28:34 stave off threshold dismissal for want of an adequate statement
14:28:39 of their claim.
14:28:39 So, again, the Supreme Court relied on Rule 8's
14:28:43 statement -- Federal Rule of Civil Procedure 8, saying that all
14:28:47 that is required is a short and plain statement of the case and
14:28:52 that the pleadings need to be construed to do justice.
14:28:56 In the event that Your Honor thinks that the
14:29:00 complaint is not specifically detailed, Plaintiffs would
14:29:03 request leave to replead. We could do that very quickly and
14:29:06 provide additional detail should the Court think that's
14:29:11 necessary or appropriate.
14:29:13 But, Your Honor, my time is running short, so I will
14:29:21 note just quickly that Plaintiffs' substantive due process
14:29:24 claims of course are governed by the undue burden standard.
14:29:29 That standard is highly fact intensive. Defendants have
14:29:33 pointed to other cases in which laws similar to some of the
14:29:38 laws challenged here were upheld based on insufficiency of the
14:29:43 factual record. Defendants haven't pointed to a single case
14:29:47 where an abortion restriction was upheld as a matter of law.
14:29:49 In all of the cases that they cite concerning
14:29:52 physician-only laws, concerning waiting periods, and so on, the

court says that the plaintiffs failed to produce sufficient evidence to demonstrate that these laws are unconstitutional, but they didn't hold that it's impossible to produce that kind of evidence.

In *Casey* the Supreme Court also noted that medical science evolves and that, as a result of that, some of the rules and some of the facts that are -- that were correct in 1992 may not continue to be correct going forward. In *Casey* the court specifically talked about the viability standard and said, you know, the point of viability, the point at which a state can lawfully prescribe abortion, is going to change over time.

Well, the same is true about some of the other regulations that, you know, the State has talked about. The state of medicine is very different in 2019 than it was in 1973 or 1992, and that's all part of the relevant factual record that the Court needs to take into account in balancing the benefits of law against its burdens.

Plaintiffs are entitled to proceed to trial and to present evidence in support of their undue burden claims, and Plaintiffs are confident that they'll be able to present evidence sufficient to establish violations of the undue burden standard.

With respect to the university chancellor, Your Honor, first of all, the State didn't raise the sovereign

immunity issue until its reply brief. Sovereign immunity is waivable, and, therefore, the State waived it by not raising it in its initial brief.

But to the extent this issue is relevant to Plaintiffs' standing to bring claims against the university chancellor, I will simply point out that the chancellor is the chief executive officer of the university. He is responsible for the conduct of all of the other personnel at the university, and he has the authority to order university personnel to conform their conduct to the requirements of the Constitution or any order of this Court. So he is an appropriate defendant.

Should the Court believe otherwise, then we would request leave to replead and add to the case as defendants the head of each and every one of the UT schools. But we don't think it's necessary to bring that many defendants into the case. We believe that the chancellor is the appropriate defendant because he's the chief executive --

THE COURT: Why is it appropriate to have that set of allegations in this case that is effectively attacking statutes if for the most part? Why should that not be handled separate and apart based on the facts of that particular allegation?

MS. TOTI: Your Honor, the plaintiffs chose to include those claims in this case for purposes of efficiency because, you know, many of the issues are related and, you

know, it's the same plaintiffs who are affected. So they thought it would be most efficient to deal with all of those issues at once. Should the Court want to sever those claims and deal with them separately, the plaintiffs are certainly amenable to that, provided that it won't result in unreasonable discovery obligations on them.

THE COURT: Go ahead.

MS. TOTI: If the Court has no further questions, then I'll rest there.

THE COURT: I have no further questions. Thank you for your argument.

MS. TOTI: Thank you.

THE COURT: Ms. Klusmann, you've got five minutes. You gave Ms. Dippel five, and she gave you back five. And so everything's right.

MS. KLUSMANN: Thank you, Your Honor. I'd like to start first with a few legal points. Ms. Toti says that, well, sure, *Hellerstedt* didn't change *Casey*, but it undid every previous Fifth Circuit case. That's absolutely untrue. There are two cases that use the rational basis standard in the Fifth Circuit: the one dealing with admitting privileges, which is not at issue here, and the one dealing with admitting privileges and, again, the ambulatory surgical center law. Every other Fifth Circuit case is still good law. And our motion to dismiss actually relies primarily on Supreme Court

14:34:26 case which is are unquestionably still good law. So
14:34:29 *Hellerstedt*, again, does not open up any new legal avenues.
14:34:33 I'd like to talk a little bit, just because I think
14:34:36 it's a good example, about the facility licensing claim. She
14:34:40 doesn't respond -- she did not respond to our allegations that
14:34:44 they are actually seeking to strike down sterilization and
14:34:47 infection control requirements, that you have running water or
14:34:52 sinks or functioning toilets. She just says it's wrong to
14:34:55 license abortion facilities.
14:34:57 Well, *Roe* says you can license abortion facilities.
14:35:00 *Roe* says you can require health and safety measures at abortion
14:35:04 facilities. That's black letter law. It is in the original
14:35:09 case that established the right to abortion. That's just not
14:35:14 going to be a legal argument that can move forward. So their
14:35:17 only option is to challenge individually every single thing in
14:35:22 Chapter 139, such as toilets and infection control procedures.
14:35:28 They have no answer for that. And, again, their pleadings are
14:35:31 completely devoid of -- or allegations that, you know,
14:35:36 requiring training for their employees somehow causes an undue
14:35:40 burden on a woman's right to have an abortion.
14:35:43 So, again, you cannot knock out the facility
14:35:47 licensing requirement without violating *Roe*. So, therefore,
14:35:50 you do have to look at all of those individually, and they have
14:35:55 absolutely no answer for that.
14:35:57 And that just links back again to the standing

argument. I think that the question that needs to be asked is: Will enjoining these laws benefit women? And if the answer, common sense, is no, then this case should not move forward because, number one, Plaintiffs should be denied third-party standing. If their claims are not going to benefit their patients, then they have a conflict of interest, and they should not be allowed to assert their patients' rights in court. Number two, if striking down these laws will not benefit women, then they are not an undue burden, and they will lose on the merits.

Ms. Toti also did not again claim that they are bringing a cumulative effects claim. So the idea that all of these laws together somehow create an undue burden where they might individually be constitutional, that should not be before this Court. And there aren't sufficient facts anyway to explain why there is a burden. Dr. Kumar is performing abortions. Whole Woman's Health Alliance has a clinic and is operating. There is no allegation that they or anyone else in Texas has been thwarted in their attempt to open a clinic by some combination of these laws.

So they have not pled it, it's not a thing that has been legally recognized by the Supreme Court, and there's just -- there are no facts to establish that they would be successful in such a claim.

And then, yes, to Your Honor's question about whether

14:37:24 they have linked their laws to the facts in the case -- or
14:37:29 their pleadings to laws in the case, there's nothing in there
14:37:33 that explains why reporting requirements present a substantial
14:37:38 obstacle to a woman seeking abortion. There's nothing in there
14:37:42 about why, let's see, the procedural requirements for informed
14:37:47 consent create a substantial obstacle to abortion or why the
14:37:51 venue requirements for judicial bypass create a substantial
14:37:56 obstacle to abortion.
14:37:57 We should not have to go through all of this
14:37:59 discovery. We should not have to sit Dr. Kumar down and go
14:38:03 through the entirety of chapter 139 and say: Which one is too
14:38:07 hard for you to do? Which one is driving women from your
14:38:10 clinic? The commonsense answer is that none of them are. We
14:38:12 are regulating abortion facilities as medical facilities, as we
14:38:16 are constitutionally permitted to do so.
14:38:18 So, again, I just think that is an example of how
14:38:21 their claims are deficient, and their pleadings certainly do
14:38:25 not state a plausible claim on their face.
14:38:31 As to the chancellor, the complaint said that he
14:38:34 engaged in misconduct, but their response to our motion to
14:38:37 dismiss made it clear he had not. So when that was clear, we
14:38:40 raised our sovereign immunity argument. We raised it at the
14:38:43 first moment that it became apparent that sovereign immunity
14:38:46 was applicable.
14:38:47 And their argument that well, he's over all of the

university system, that would make him responsible for every single act of misconduct by every employee. And that's just simply not the law. He has to be in charge of the decision that is unconstitutional, and there is nothing in here to say that is the case.

Texas regulates the provision of abortion to ensure that it is safe; that a woman's decision is fully informed; and that minors seeking abortion have the counsel and maturity that they need. The Supreme Court has upheld these laws, and Plaintiffs have given the Court no legal or factual grounds to reach any other conclusion than the ones that Court has already reached. Their claims are meritless, and some of them border on the frivolous. The Court should grant Defendants' motions.

I think that is about my five minutes, unless you have further questions, Your Honor.

THE COURT: No. You did well with it.

MS. KLUSMANN: Thank you.

THE COURT: I want to thank you all for good arguments. As I said, I'm not sure that the way this is pleaded is as enlightening as the way it was argued today. I think the arguments have been helpful. We are going to go through and look at this and see if we think we can come up with a ruling that will make sense based on the record. If we can, the case is submitted, and we'll come up with that ruling. If we cannot, we may get back together and have a conference

14:40:20 about how to replead it or lay out the issues better in order
14:40:23 that it is extremely clear as to what we're doing.
14:40:27 But, Happy New Year to everyone. Thank you for being
14:40:30 here. And the matter is under submission, and the court's in
14:40:33 recess.
14:40:34 (End of transcript)

UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, Arlinda Rodriguez, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 20th day of May 2019.

/S/ Arlinda Rodriguez
Arlinda Rodriguez, Texas CSR 7753
Expiration Date: 10/31/2021
Official Court Reporter
United States District Court
Austin Division
501 West 5th Street, Suite 4152
Austin, Texas 78701
(512) 391-8791